IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. [redacted]111

NATIONAL BRAKE AND ELECTRIC COMPANY, *Petitioner*, *vs.* NIELS A. CHRISTENSEN and ALLIS-CHALMERS COMPANY, *Respondents.*	Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER IN OPPOSITION TO MOTION OF RESPONDENTS TO DISMISS.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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No. 382

NATIONAL BRAKE AND ELECTRIC COMPANY, *Petitioner*, vs. NIELS A. CHRISTENSEN and ALLIS-CHALMERS COMPANY, *Respondents.*	Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER IN OPPOSITION TO MOTION OF RESPONDENTS TO DISMISS.

I.

THIS COURT'S JURISDICTION TO AWARD THE CERTIORARI WAS INVOLVED AND DECIDED AND SUSTAINED BY THE COURT IN DIRECTING ITS ISSUE, AND THAT ACTION IS DECISIVE OF THIS MOTION.

The question raised on the respondents' motion here to dismiss is therefore no longer an open one. That question stood at the threshold when we applied for the certiorari.

Counsel for petitioner conceived that the decision of the Circu Court of Appeals here in question was one

which was made final by Section 148 and so not appeal-able of right; and that the proper method for seeking a review of this court was by certiorari, and accordingly in proper time applied promptly to this court therefor; and the court here thereupon granted said writ and the same was issued on June 17, 1919, all of which was within three months after the entry of the judgment or decree of the Circuit Court of Appeals of April 29, 1919.

The judgment of this court awarding the certiorari was a ruling that the case was a proper one for such writ. The petitioner had the right to rely upon the award of the certiorari as lawfully made, without praying for an appeal. It is now too late for respondents to raise the question. If they failed to raise it in opposing the application for the certiorari, it is obvious that they could not so stand by, without raising the point now made until the writ is issued, and the time of petitioner to pray an appeal, if that were necessary, had gone by, and afterwards urge the point upon motion to dismiss.

II.

THE PROCEEDING IN THE CIRCUIT COURT OF APPEALS, HERE UNDER REVIEW, WAS NOT AN ORIGINAL PROCEEDING OR CASE IN THAT COURT, IN ANY SUCH SENSE AS IS CONTENDED BY RESPONDENTS.

It was a supplemental proceeding in Case No. 2163 in that court. The controversy tendered by said petition to the Circuit Court of Appeals was still over the same old question of the validity or invalidity of Patent No. 635,280,—which was in said case from its commencement in the District Court to and through the proceedings on appeal in the Circuit Court of Appeals, and the applica-

tion of the petitioner to vacate the interlocutory orders or decrees sustaining the patent.

That issue having been determined by the final decree of the court at Pittsburgh upon the bill of complaint of respondents there, the petitioner here maintained that the courts of the Seventh Circuit should make a like finding upon that question and enter a like judgment in the suit there adjudging said patent invalid,—their former interlocutory judgments to the contrary notwithstanding.

The courts of the Seventh Circuit denying and dismissing such application, this certiorari was applied for and issued; and thereupon the question as to the validity of said patent is here presented, viz:

Shall said patent be adjudged to be invalid by the courts in the Seventh Circuit in the suit there, in accordance with the final judgment of the District Court at Pittsburgh? For which we submit the case of *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S., 294, is direct authority.

We briefly summarize the situation:

This case arose by the respondents' filing their bill of complaint against petitioner in the Circuit Court for the Eastern District of Wisconsin, at Milwaukee, on December 17, 1906, setting up the Letters Patent No. 635,280 therein mentioned, issued to respondent Christensen, alleging its infringement by the petitioner, and praying for an injunction and an accounting and decree for profits and damages. *Hugule Mfg. Co.* v. *Galeton Cotton Mills*, 184 U.S., 290, 294-5; *MacFadden* v. *United States*, 213 U. S., 288, 294. Answer was filed March 1, 1907. (Rec., 20.) An amended bill was filed November 10, 1913. (Rec., 18.)

After hearing upon the issues—*a principal issue being as to the validity of said Patent No.* 635,280,—the interlocutory decree was entered August 21, 1914, sustaining the validity of said patent, finding its infringement by defendant, awarding an injunction and directing an accounting before a master (Rec., 39-40); and upon appeal said decree was (on October 5, 1915) affirmed by the Circuit Court of Appeals (Rec., 49-50). It is in that patent case that the proceeding here in question was taken.

The case in the Seventh Circuit being pending before the master upon the accounting, after it was remanded, that same important issue—as to the validity of said Patent 635,280,—was afterwards again, by the respondents herein, presented afresh for determination to the District Court for the Western District of Pennsylvania at Pittsburgh, by their bill of complaint filed March 13, 1916, against the Westinghouse Traction Brake Company (with which this petitioner here was in privity)—said bill being cast in the same mould as the amended bill in the Milwaukee case above mentioned. (Rec., 56-65.) No reference was made in said Pittsburgh bill to the suit in the Seventh Circuit. And upon proper issues such proceedings were had in the Pittsburgh case, that by the decision of the Circuit Court of Appeals for the Third Circuit upon proper hearing herein, said Patent No. 635,280 was held to be invalid on the ground that it was issued without warrant of law. (Rec., 107, 112.) Thereupon, afterwards, by the decree of said District Court of the United States at Pittsburgh entered pursuant to said decision and mandate of said Circuit Court of Appeals for the Third Circuit—said Patent 635,280 was adjudged to be invalid, having been issued without warrant of law. (Rec., 115.) And the bill of complaint

and suit itself was thereupon afterwards on the same day dismissed, so that the decree adjudging the patent invalid became final and irreversible.

Thereupon, the decrees in the District Court at Milwaukee, and in the Circuit Court of Appeals for the Seventh Circuit, holding the said Patent No. 635,280 valid, being—as counsel for the petitioner here conceived—interlocutory and within the power of such courts to vacate, and not final and irreversible; and the decree at Pittsburgh adjudging such patent to be invalid being final and irreversible,—the petitioner here presented the application to the Circuit Court of Appeals for the Seventh Circuit which is here in question.

Upon such application *the issue before the court was still the question as to the validity of said patent,* which was presented by and upon the bill of complaint of the respondents here in the District Court at Milwaukee.

Our petition to the Circuit Court of Appeals assumed, of course, that that court had the jurisdiction and power to entertain and grant the application. In other words, it assumed as a basis that the decree of the District Court sustaining the validity of Patent 635,280, and its own decree affirming that of the District Court, were interlocutory and not final. This is made clear by the petition itself, as it was understood by the Court of Appeals as shown by their opinion (Rec., 257), and by the order of that court denying the petition (Rec., 264).

It was a supplemental petition and proceeding bringing before the court the fact that after the interlocutory decrees in question in the Seventh Circuit, sustaining Patent 635,280, a *final* decree in the District Court at Pittsburgh was entered adjudging said patent invalid and it prayed for a rehearing in the Seventh Circuit courts upon that question as to the validity of said pat-

ent in view of said final decree adjudging its invalidity,—which (under the decision of *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S., 294) was, as we conceived, conclusive upon that question upon the courts in the Seventh Circuit. The application was first made to the District Court (Rec., 16 *et seq.*, 242-251) which denied it, but stayed the proceedings before the master for ten days to enable the application to be made to Circuit Court of Appeals (Rec., 251); and thereupon (counsel having in mind the ruling of this court in *Re Potts*, 166 U. S., 263, and other cases) this petition was there accordingly presented (Rec., 1-6).

This supplemental petition or pleading by the defendant was between the same parties and involved the same subject matter,—the validity of said patent,—as the Case No. 2163 in that court. It was not a new or original suit or case, but a new part of the patent case then still pending, to which it was supplemental.

Baker v. *Whiting*, 1 Story, 218.

Longworth v. *Sturges*, 4 Ohio, St. 690, 707, 70

Story's Pleadings, §§ 18, 20, 21.

III.

THE CASE—THE PROCEEDING HERE BEFORE THE CIRCUIT COURT OF APPEALS—WAS A CASE ARISING UNDER THE PATENT LAWS WITHIN THE MEANING OF SECTIONS 128 OF THE JUDICIAL CODE.

This is settled by decisions of this court. *Huguley* v. *Galeton Cotton Mills*, 184 U. S., 290, 294-5; *MacFadden* v. *United States*, 213 U. S., 288, 294.

In *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 294-5, this court, construing Section 6 of the Circuit

Court of Appeals Act (Judicial Code, Section 128) said that the jurisdiction referred to in the provision that all judgments and decrees of the Circuit Court of Appeals should be final in all cases where the jurisdiction is dependent entirely on diversity of citizenship—"is the jurisdiction of the Circuit Court as originally invoked."

In *MacFadden* v. *United States*, 213 U. S., 288, 294, the court said that "the line of division between cases appealable from the Circuit Court of Appeals to this court and those not so appealable, drawn by Section 6, * * * is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the trial court."

The fact, then, that particular questions were before the Court of Appeals on our petition such (1) as to the finality or otherwise of the decree of the District Court sustaining Patent No. 635,280 and of its own decree affirming that of the District Court, and (2) as to the effect as *res judicata* of the final decree of the Pensylvania court adjudging the same patent to be invalid, does not determine or affect the question here of appealability of the decree of that court denying our petition which is under review on this certiorari. That is merely one "of the questions of law raised," while the material point is "the source of jurisdiction of the trial court." That source was the patent laws.

IV.

IF THE CASE IN QUESTION BEFORE THE CIRCUIT COURT OF APPEALS, AND NOW BEFORE THIS COURT ON CERTIORARI, WERE NOT ONE MADE FINAL BY SECTION 128, BUT WAS ONE FROM WHICH AN APPEAL TO THIS COURT WOULD LIE,—IT WOULD NOT FOLLOW THAT THIS MOTION TO DISMISS FOR WANT OF JURISDICTION HERE SHOULD BE SUSTAINED.

The case is here by the exercise by this court of its jurisdiction and power to issue the certiorari. If the power exists, this motion is not well taken.

It has never been held, so far as we are aware, that this court is without power to issue a certiorari in any case over which it may have appellate jurisdiction. The certiorari method is one exercise of appellate jurisdiction. (Jud. Code, § 240.) The certiorari jurisdiction is much broader than the jurisdiction by appeal.

The Act of Congress (Judicial Code, Section 240) provides that when a case has been brought up by certiorari, the Supreme Court *has the same power and authority over it as if it had been carried there by appeal or writ of error.*

The power of the court to issue writs of certiorari to the Circuit Court of Appeals is, however, not limited to the provisions of Section 240 of the Code. They may be issued under Section 262 of the Code—a power which has been in the federal statutes since the Judiciary Act of September 24, 1789, was passed.

McClellan v. *Garland*, 217 U. S., 268, 278.

It is settled that Section 262 contemplates the employment of certiorari hereunder in instances not covered by Section 240, and affords ample authority for using

the writ whenever there is imperative necessity therefor in giving full force and effect to existing appellate authority and of furthering justice in other kindred ways. *American Const. Co.* v. *Jacksonville Ry.*, 148 U. S., 372, 380; *In re Chetwood*, 165 U. S., 443, 462; *Whitney* v. *Dick*, 202 U. S., 132. The writ may be issued "whenever the circumstances imperatively demand that form of interposition, as at common law, to correct excess of jurisdiction and in furtherance of justice."

McClellan v. *Garland*, 217 U. S., 268, 278.
In re Chetwood, 165 U. S., 443, 461.

It is submitted that the writ would be imperatively demanded in furtherance of justice by the circumstance that a party having a right to appeal had lost that right by acting in reliance upon the ruling of the court of last resort that the writ of certiorari was the proper remedy.

V.

THE CASE HERE IS WITHIN THE SPIRIT AND MEANING, INTENTION AND APPLICATION OF SECTION 4 OF THE ACT OF SEPTEMBER 6, 1916, AND THAT PROVISION IS TO BE CONSTRUED AS COVERING THE CASE AT BAR.

Section 4 of the Act of Congress of September 6, 1916 (referred to on page 15 of respondents' brief) provides that no court having power to review a judgment or decree rendered or passed by another, shall dismiss a writ of error or appeal solely because the other method of review should have been taken, but shall dispose of the case and take the action which should be appropriate if the proper appellate procedure had been followed. (6 Com. Stat., Sec. 1228a.) It is submitted that the word "appeal" in this section includes a petition for certio-

rari. When that petition is allowed, the case is here in this court with the same power and authority as if it had been carried by appeal or writ of error. (Jud. Code, § 40.)

Again, if not within the letter, this case is within the spirit and intention—the "equity" and implication—of Section 4 of the act in question and is within its application.

In *Gauzon* v. *Compania General*, 245 U. S., 86, 89, the court said, that this section "requires that the party seeking review shall have it in the appropriate way notwithstanding a mistake in choosing the method of review." Obviously then, a mistake in choosing the certiorari method under Section 240, where appeal was the proper method, comes within the intention of this Section 4.

This statute is clearly remedial and curative and should have such construction; and the principle is settled that rights and remedies under such a statute may be based and enforced upon what is called the spirit or the "equity" of a statute,—as being within its intention, —although they may not be strictly within its terms, where the same reason for its application applies to its full extent to the case at bar as to a case within its express terms; or in other words, "Where there is no reason why the rights of a party should be saved in the one case and not in the other."

Exrs. of Haymaker v. *Haymaker*, 4 Ohio St., 272, 279-80.

Coffin v. *Cottle*, 16 Pick., 383.

Holy Trinity Church v. *United States*, 143 U. S., 457.

In *Holy Trinity Church* v. *U. S.*, 143 U. S., 457, 458-9, the Act of February 26, 1885, prohibiting the importation and immigration of foreigners and aliens under contract to perform labor or service of any kind in the United States, included, within the letter thereof, as was conceded, the engagement of an alien rector or pastor for the church in question; and the specific exceptions made in the act (which did not include the case of the rector or pastor), was conceded to strengthen the idea that every other kind of labor and service was intended to be included within the prohibition. Nevertheless the court held that, while within its letter, the case of the rector or pastor was not within the statute, because not within its spirit, nor within the intention of its makers.

In *Coffin* v. *Cottle*, 16 Pick., 383, 385-386, the proviso of a statute of limitations provided that if a judgment for plaintiff be *reversed for error*, or *be given against him for matter alleged in arrest of judgment*, after a verdict in his favor, he might within a year commence a new action.

In that case a plea had been sustained as a bar to a *scire facias;* and within a year thereafter, but more than six years after the debt accrued, and after the statute of limitations had run against the same, the plaintiff commenced a new suit. Although the case did not come within the terms of the proviso, Mr. Chief Justice Shaw held that the statute was remedial and considering what it was founded upon—its purpose—construed the proviso as being meant to apply to a case "where the plaintiff had been defeated by some matter not affecting the merits,—some defect or informality which he can remedy or avoid by a new process"; and he sustained the suit as being within the proviso or saving clause.

This case comes strikingly within the rule laid down in the cases cited, and many other cases to the same purport.

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